89- 1461

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1989

GILMORE STEEL CORPORATION, d/b/a
OREGON STEEL MILLS, INC.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF OREGON STEEL MILLS, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's previous decisions, the Court of Appeals erred in enforcing an order of the National Labor Relations Board that Petitioner's practice of restricting job bidding to currently working employees was inherently destructive of unreinstated strikers' rights under Section 7 of the National Labor Relations Act.*

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* In addition to the parties listed in the caption of this petition for a writ of certiorari, the United Steelworkers of America, AFL-CIO, was also a party to the proceedings below.

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

Petitioner, Gilmore Steel Corporation, dba Oregon Steel Mills, Inc. ("Oregon Steel"), respectfully prays that a writ of certiorari issue for review of the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 17, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, infra, 1a) is not reported. The

Decision and Order of the National Labor Relations Board (App. B., infra, 4a) and the Decision (App. C, infra, 16a) and Supplemental Decision (App. E, infra, 80a) of the Administrative Law Judge are reported at 291 NLRB No. 27.

JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1989. Oregon Steel's timely petition for rehearing was denied on December 14, 1989 (App. D, infra, 72a). This Petition is filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and § 158(a)(3), provide in part:

"(a) It shall be an unfair labor practice for an employer--

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...."

STATEMENT OF THE CASE

A. Preliminary Statement

The factual setting is accurately summarized by the Administrative Law Judge (App. C, infra, 25a-28a) as follows:

"Respondent operates a steel mill in Portland, Oregon, which employs between 500 and 600 employees. For many years Respondent's production and maintenance employees were represented by Local 3010 of the Union and the clerical and laboratory employees were represented by the Union's Local 6380. The last collective-bargaining agreement for the production and maintenance and clerical and laboratory units each expired on September 1, 1983. On September 9, 1983, both the unit represented by Local 3010 and the unit represented by Local 6380 commenced a strike against

Respondent. Respondent continued to operate during the strike with employees that crossed the picket line, permanent replacements and, in the clerical unit, a few employees from an agency providing temporary employees. On June 26, 1984, the Union, on behalf of all the employees in both units, made an unconditional offer to return to work. A collective-bargaining agreement was not executed and in January, 1985, Local 3010 and Local 6380 were each decertified as the collective bargaining representative in its respective unit.

At the end of the strike, Respondent did not have positions for the former strikers. With one exception, when there were openings, Respondent recalled strikers from the list of unreinstated strikers, hereinafter referred to as the Laidlaw list.***

Following the strike, Respondent, suffering business losses, attempted to reduce the size of its work force. When job vacancies arose, Respondent attempted to fill these positions from within the plant without recalling strikers, thereby decreasing its total work force. All such positions were posted in the plant for employees to bid on them. The bidding was limited to employees actually working. Thus, former strikers not yet recalled were not permitted to bid on these jobs. General Counsel and the Union contend that by limiting the bidding to current employees, Respondent granted superseniority to replacements and

employees who crossed the picket line as opposed to strikers."

On September 23, 1986, the Administrative Law Judge issued his original Decision, finding that Oregon Steel Mills violated the National Labor Relations Act by restricting job bidding to currently working employees. (App. C, infra, 16a). Exceptions were filed with the National Labor Relations Board ("NLRB").

On April 24, 1987, the NLRB remanded the case to the Administrative Law Judge, for the purpose of making credibility determinations, Findings of Fact, Conclusions of Law, and Recommendations relating to the business justifications advanced by Oregon Steel Mills for restricting bids to currently working employees. (App. D, infra, 72a).

On July 22, 1987, the Administrative Law Judge issued a Supplemental Decision relating to the issue on remand. (App. E,

infra, 80a). In his Supplemental Decision, the Administrative Law Judge specifically noted that there was no showing of anti-union motivation, but held such a showing to be "unnecessary" because he found that the bidding procedure was "inherently destructive" of the unreinstated strikers' rights under the National Labor Relations Act. (App. E, infra, 87a-88a). Exceptions were filed to the Supplemental Decision.

On September 30, 1988, the NLRB issued its Decision and Order, adopting the Decision of the Administrative Law Judge. (App. B, infra, 4a).

Oregon Steel filed a timely petition for review of the Board's Order with the United States Court of Appeals for the Ninth Circuit. On October 17, 1989, in an unpublished opinion, the Court of Appeals enforced the Board's Order in its entirety. (App. A, infra, 1a).

B. Summary of Facts Regarding Oregon Steel's Method of Filling Jobs.

Oregon Steel Mills is a manufacturer of steel plate (Tr. 847)[1]. Its competitors are steel plate producers throughout the world (Tr. 851-852, 968). The last profitable year Oregon Steel had prior to the 1986 hearing was in 1981. (Tr. 849). Between 1981 and the time of the hearing, Oregon Steel lost $14,000,000 (Tr. 850), due to a shrinking market and subsidized foreign competition. (Tr. 851).

Oregon Steel's sole hope for survival was to become more productive (Tr. 852, 968). It introduced state of the art technology and, concurrently, drastically reduced the number of employees in all areas--managerial, production and maintenance, and office and clerical

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[1] "Tr __" references denote the stenographic transcript of the proceedings before the Administrative Law Judge ("ALJ").

(Tr. 854-860). In 1981, the last year that showed a profit, the total number of employees was 661. (Tr. 860). By the time of the hearing in this matter, the number was 510 (Tr. 860). The trend was consistently and deliberately downward. (Tr. 860). The result was a near doubling of productivity, from 180 tons per year per employee in 1983--pre-strike--to 350 tons per year per employee at the time of the hearing. (Tr. 860).

Oregon Steel Mills' overriding requirement was to achieve maximum production by combining state-of-the-art equipment with the leanest, most qualified workforce possible (Tr. 861).

When a position came open at Oregon Steel, the first thought was always to attempt to get by with one less person through a merger of functions. Such attrition was the preferred manner of reducing the work force. If it became

necessary to fill the particular position that had come open, it was filled from within by an open bidding system, with the same scrutiny being applied to the position left by the successful bidder. In other words, the Employer tried to be able to do the required work with a reduced work force (Tr. 722).

If, after exhausting all attempts to handle the work through internal adjustments, it became necessary to add employees to the payroll, this was done by recalling an employee from the *Laidlaw* list. All additions to payroll from the end of the strike to the time of the hearing (with the exception of a chemist, not at issue in this proceeding) were from the *Laidlaw* list.[2]

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[2] "*Laidlaw* list" is the shorthand reference for the preferential recall list of unreinstated strikers. The name is derived from *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

In addition to the business necessity of making do with fewer people whenever possible, it was essential that jobs be filled by people who knew how to do them (Tr. 722). Suffering huge losses, Oregon Steel did not have the luxury of assigning untrained people to jobs which had changed dramatically in content (Tr. 722).

After the Union went on strike, the Company set about becoming more productive and more competitive by hiring the best people it could find and cross-training them, eliminating artificial boundaries so that every individual would have the flexibility to move into other jobs (Tr. 723, 973). A person who successfully bid into a job was fully qualified to step in and do that work (Tr. 722).

In addition to the ongoing cross-training program, Oregon Steel instituted during and after the strike a number of additional processes which were designed

to increase productivity. One of these was the Statistical Process Control Method (SPC) which allowed individual operators to monitor their operations and make appropriate adjustments during the production process. (Tr. 724-726; 853-854). This involved six to eight days of training (Tr. 725-726). Another involved the institution of Standard Operating Metallurgical Procedures, developed jointly by the Metallurgy Department and the operating people. (Tr. 858). Neither of these processes existed pre-strike. (Tr. 854, 856).

There were major post-strike changes in equipment and job functions as well. The most dramatic single change was the introduction of a new ultra high powered, eccentric bottom-tapping (EBT) furnace, the first of its kind in North America (Tr. 888), which permitted Oregon Steel to focus on higher quality grades of steel

plate where it could be more competitive (Tr. 854). Pre-strike, 80 percent of production was in mild, "vanilla" steel grades (Tr. 856). 80 percent of production at the time of the hearing was in the exotic critical grades, while 20 percent was in the mild steel grades. (Tr. 848, 856). This change altered the production process in every phase of the operation. (Tr. 848-849).

Furnace operation and staffing requirements all changed greatly as a result. The new furnace was "a complete renovation," "completely different." (Tr. 855). The emphasis on higher steel grades, closer tolerances and greater attention to quality were reflected throughout the Company.

The evidence at the hearing established that none of the jobs listed as challenged bids was the same post-strike as it was pre-strike (Tr. 855-859,

882-897, 912-932). In each case, if an individual had been recalled from the *Laidlaw* list to perform that job, that individual would have required training to do it, whereas the successful bidder was already trained to perform the job and could step right into it (Tr. 723).

When Oregon Steel had a position to be filled, it needed to be filled quickly with a person who was capable of moving in and performing the work. There was new equipment in many areas that pre-strike employees were not trained in (Tr. 675). There were new procedures, including statistical process control procedures in many areas of the plant (Tr. 675). Job boundaries had been changed (Tr. 675). Most, if not all, employees in the plant were doing what would have been a combination of pre-strike jobs (Tr. 675). The pace was faster (Tr. 675). The quality and production standards were higher (Tr.

675). The existing work force was trained to work under these conditions (Tr. 675). The result was more production with fewer people (Tr. 675). Oregon Steel needed people who could maintain that high level of quality production (Tr. 675-676; 985).

Job bidding at Oregon Steel Mills was historically available only to employees currently working. (Tr. 324-25; 976). It was never extended to employees on layoff or out of the plant for any other reason. (Tr. 97; *Id.*).

Oregon Steel's past practice--in its only other strike--was exactly the same as it was in the situation before the Court. That is, bids were awarded internally while unreinstated strikers were still outside the plant. The unreinstated strikers were not notified of the bid postings. (Tr. 679).

REASON FOR GRANTING THE WRIT

The Ninth Circuit's enforcement of

the Board's Decision is contrary to a Decision last term by this Court and to recent decisions of other Courts of Appeals and the Ninth Circuit itself.

A. Oregon Steel Mills' Practice of Restricting Job Bidding to Currently Working Employees was not Inherently Destructive of Employee Rights.

In *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants [TWA]*, ___ U.S. ___, 109 S.Ct. 1225 (February 28, 1989), this Court was faced with a similar situation to the case at bar.[3]

In *TWA*, the Union's complaint was identical to that of the Union in the present case--that restriction of job bidding procedures to currently working employees meant that unreinstated strikers

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[3] *TWA* arose under the Railway Labor Act. However, this Court expressly decided the case using the principles of the National Labor Relations Act, analogizing to the Railway Labor Act.

would be prevented from getting to the "better" jobs, even though they might have held those jobs prior to going on strike or because they might have otherwise been able to reach those jobs due to seniority or other factors. In *TWA*, the "better jobs" were certain desirable locations or "domiciles" such as San Francisco or Los Angeles.

Just as in the case of Oregon Steel, TWA restricted its bidding procedures to currently working employees. Only employees currently at work could bid on "domiciles" which might come up. And just as in the case of Oregon Steel, once individuals from the TWA recall list were reinstated, their seniority was intact. Neither TWA nor Oregon Steel offered any sort of "super seniority" or extra length of service credit to crossovers or replacements.

This Court rejected the Union's claim

that TWA's restriction constituted a violation of the National Labor Relations Act and, by analogy, the Railway Labor Act. 109 S.Ct. at 1235.

Justices Brennan and Marshall would have held the restriction to be "inherently destructive" under the rule of *Erie Resistor* [*NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963)]. 109 S.Ct. at 1235-1240. However, the majority opinion concluded:

"We reject this effort to expand *Erie Resistor*." 109 S.Ct. at 1232.

Erie Resistor involved a grant of 20 years' "super seniority" as an inducement to abandon the strike, meaning that employees with the extra 20 years would be virtually immune from layoff relative to their striking fellows. In "bidding" cases like *TWA* and the present case, by contrast, there is no grant of super seniority. Once reinstated, an employee's

length of service is intact and can be used for any purpose.

This Court's refusal to call the bid system "inherently destructive" is consistent with the Ninth Circuit's earlier holding in *Portland Willamette Company v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976). According to the *Portland Willamette* decision, conduct is "inherently destructive" only when it has:

> "...far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity. Examples of inherently destructive activity are permanent discharge for participation in union activities, granting super-seniority to strike breakers, and other actions creating visible and continuing obstacles to the future exercise of employee rights...."

534 F.2d at 1334.

In 1979, in *Loomis Courier Serv., Inc. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979), the Ninth Circuit noted:

> "The phrase 'inherently destructive' is not easily defined and cases

> finding violations under this standard are relatively rare. See, e.g., *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 50 (9th Cir. 1970). It is generally acknowledged, however, that 'actions creating visible and continuing obstacles to the future exercise of employee rights' are inherently destructive...."

595 F.2d at 495.

More recently, in *Intern. Broth. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988) the Court cited with approval the decisions of both the Eighth and Ninth Circuits:

> "...As restated by the Eighth Circuit, inherently destructive conduct is 'that which creates visible and continuing obstacles to the future exercise of employee rights,' *Inter-Collegiate Press*, 486 F.2d at 845 (citing Note, *supra*, at 686); or as the Ninth Circuit has put it, such conduct has 'far reaching effects which would hinder future bargaining.' *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976)."

858 F.2d at 763.

A bid system like Oregon Steel Mills' has none of these indicia. It applies uniformly across the board--to new hires,

replacements and reinstated *Laidlaw* people alike. Also, Oregon Steel Mills' system does not create any obstacle to the future exercise of employee rights. To the contrary, the system ensures that everyone competes for opportunities on an equal footing.

Oregon Steel's bid system did not create "visible and continuing obstacles to the future exercise of employee rights." *Portland Willamette Co. v. NLRB, supra*, 534 F.2d at 1334. Upon reinstatement former strikers enjoyed the same job bidding rights as every other employee--there were no distinctions. And, as stated by the D.C. Circuit in *Boilermakers, supra*, nothing about the bid system was "inherently destructive of the process of collective bargaining," 858 F.2d at 763, nor did it "discourage[s] collective bargaining in the sense of making it seem a futile exercise in the

eyes of employees." 858 F.2d at 764. Indeed, Union witnesses testified--and they were credited by the Administrative Law Judge--"that they did not know of a bidding procedure until 'late March or early April of 1985'" (App. C, infra, 57a-58a)--several months after the Steelworkers were decertified as collective bargaining representative.

In *NLRB v. Erie Resistor Corp.*, *supra*, the grant of 20 years' superseniority was struck down because it placed the strikers in a subservient position upon reinstatement and "stands as an ever present reminder of the dangers connected with striking and with Union activities in general." 373 U.S. at 231. In the instant case, by contrast, former strikers of Oregon Steel returned to work with their seniority intact and were immediately able to take advantage of bidding and move-up opportunities.

In his original Decision, the Administrative Law Judge made no finding that Oregon Steel Mills' bid system was "inherently destructive." However, after the Board's remand and Oregon Steel's pointing out that a failure to prove anti-union motivation was fatal to the charge, the Administrative Law Judge reversed his field in his Supplemental Decision and affixed the "inherently destructive" label.

Neither the Administrative Law Judge nor the Board cited any authority whatsoever for labeling Respondent's bid system "inherently destructive." The Administrative Law Judge cited *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) and *Laidlaw Corporation*, 171 NLRB 1366 (1968), both of which deal with the effect of a label of "inherently destructive," but he cited nothing which would support application of the label in this case.

In any event, *TWA* establishes that Oregon Steel Mills' bid system was not "inherently destructive." That being the case, proof of anti-union motivation was an essential element of the case. The failure of proof of that element--indeed, the erroneous and inexplicable statement by the Administrative Law Judge [adopted by the Board] that such a finding is "unnecessary" (App. E, infra, 87a)--requires reversal of the Board's Decision or, at the least, remand to the Ninth Circuit for reconsideration in light of the *TWA* decision.

B. Even if Oregon Steel Mills' Bidding Procedure Had a "Comparatively Slight" Effect on Strikers' Rights, General Counsel Did Not Prove a Violation of the Act.

The *TWA* case is again dispositive on this issue. In his separate opinion, Justice Blackmun would not have gone so far as Justices Brennan and Marshall in

labeling the TWA system "inherently destructive." He would have labeled it less serious, ["comparatively slight," to use the *Great Dane* phraseology], but nonetheless requiring TWA to come forward with evidence of business justification for the system. However, the majority disagreed, finding no discrimination. To the majority, the system was fair, simply representing one of the risks inherent in the statutory rights to strike and not to strike. 109 S.Ct. at 1233. Thus, the *TWA* case settled the matter: Because this practice is not even prima facie illegal, there is no reason to require Oregon Steel to come forward with evidence of business justification.

TWA establishes that Oregon Steel Mills' bidding procedure had no effect on strikers' rights. However, even if there were a "comparatively slight" effect, a violation of the National Labor Relations

Act requires proof of anti-union motivation where the employer has come forward with evidence of legitimate and substantial business justification. The justification need not be overriding, and need not be proven to the satisfaction of an Administrative Law Judge. Rather, the employer need only "come forward with evidence of legitimate and substantial business justifications for the conduct." *NLRB v. Great Dane Trailers, supra,* 388 U.S. at 34. At that point, much like the process under Title VII of the Civil Rights Act of 1972[4], it is essential that "anti-union animus must be proved to sustain the charge. *Id.*, 388 U.S. at 34.

In the present case, Oregon Steel Mills came forward with hundreds of pages of testimony relative to the business

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[4] *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

justifications for not extending bids outside the plant. Therefore, assuming arguendo, that Oregon Steel had a burden of going forward with evidence of legitimate and substantial justification, it did so, as reflected by hundreds of pages of transcript. The Administrative Law Judge agreed that Respondent came forward with such evidence, and further credited Oregon Steel's witnesses in most instances, but simply said he was not persuaded that restriction of bidding to currently working employees was essential (App. E, infra, 106a). That overstates Oregon Steel's burden. The fact that Oregon Steel presented voluminous and generally uncontradicted evidence of business justification shifted the burden to the Union and the General Counsel to establish anti-union motivation. Yet the Administrative Law Judge pointedly declined to make such a finding. (App. E,

infra, 87a).

In *NLRB v. Great Dane Trailers, supra*, this Court held:

> "...if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct...."

388 U.S. 26 at 34.

The operative words are "come forward with evidence." The case does not say "prove", either in the abstract or to the satisfaction of the Board.

It is apparent that the Administrative Law Judge's decision--as adopted by the Board--must be denied enforcement because the Administrative Law Judge misplaced the burden of proof:

> "In finding that Respondent violated the Act by failing and refusing to offer unreinstated strikers the opportunity to bid on vacancies until after nonstrikers and strike replacements had failed to bid on such jobs, I made no finding that Respondent intended to discourage

> union activities. Such a finding is unnecessary. The treatment of unreinstated strikers as inferior or subservient to other employees in this case is inherently destructive of the employees' right to strike and constitutes an unfair labor practice notwithstanding the absence of animus or bad faith unless the Employer sustains his burden of proof that the conduct was justified by legitimate and substantial business reasons. *Laidlaw, supra*; *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 380-81 (1967); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)." (Emphasis added)

(App. E, infra, 87a-88a).

Such a formulation completely misstates the law and obliterates the line between "inherently destructive" and "comparatively slight" effects.

The Administrative Law Judge specifically found that internal job bidding was the practice that Oregon Steel had followed in the past, and that it is the practice in the industry. The Administrative Law Judge also acknowledged that "the jobs have changed...," (App. E, infra, 105a) but then went on to impose an

unauthorized and virtually impossible burden of proof:

> "Respondent has not established that none of the unreinstated strikers are qualified to perform the jobs and operate the equipment. The burden of proof, that the failure to allow unreinstated strikers to bid on job vacancies was justified by legitimate and substantial business reasons, lies with Respondent. *Laidlaw, supra; Fleetwood Trailer, supra.* I find that Respondent has not met that burden."

(App. E, infra, 106a).

For the reasons stated, the Administrative Law Judge and the Board are in error. The business considerations articulated by Oregon Steel are legitimate and substantial, going directly to its ability to operate efficiently and with continuity. Once those reasons were offered, it was General Counsel's burden to establish anti-union motivation. This it failed to do, a violation of the Act was not proven, and enforcement should have been denied by the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Petitioner, Oregon Steel Mills, Inc., respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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March, 1990

APPENDIX A
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILMORE STEEL CORPORATION d/b/a Oregon Steel Mills, Inc., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 88-7488 NLRB Nos. 36-CA-4837 36-CA-4938 36-CA-4841 36-CA-4893, etc. et al. MEMORANDUM*
UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 88-7504 NLRB Nos. 36-CA-4837 36-CA-4938 36-CA-4841 36-CA-4893, etc. et al.
NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. GILMORE STEEL CORPORATION, d/b/a Oregon Steel Mills, Inc., Respondent.	)	No. 88-7543 NLRB Nos. 36-CA-4837 36-CA-4938

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

On Application for Enforcement of
an Order of the
National Labor Relations Board

Argued and Submitted September 13, 1989
Portland, Oregon

Before: PREGERSON, TROTT and RYMER, Circuit Judges

Petitioner Gilmore Steel Corporation, dba Oregon Steel Mills, Inc. challenges the NLRB's affirmance of the Administrative Law Judge's determination that its post-strike bidding system violated sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. §§ 158(a)(1), (3) by failing to permit unrecalled strikers to bid on permanent job vacancies until after replacements and nonstrikers had bid, and that the collective bargaining agreement in effect prior to the

strike requires Gilmore to compensate certain workers for vacation pay at a rate 17% higher than the amount it paid. Respondent and cross-applicant NLRB, together with intervenor United Steelworkers of America, AFL-CIO, seek enforcement of the order.

Having reviewed the record and considered the arguments of counsel, we conclude that the ALJ's findings are supported by substantial evidence and that the Board has correctly applied the law to the facts. *NLRB v. Island Film Processing Co., Inc.*, 874 F.2d 1446 (9th Cir. 1986); *Bell Foundry v. NLRB*, 827 F.2d 1340 (9th Cir. 1987). See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 88 S. Ct. 543, 19 L.Ed. 2d 614 (1967); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 87 S. Ct. 1792, 18 L.Ed. 2d 1027 (1967). Accordingly we enforce the Board's order.

APPENDIX B
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GILMORE STEEL CORPORATION
d/b/a OREGON STEEL MILLS, INC.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO	Cases 36-CA-4837 36-CA-4938
MARILYN K. McGAHAN, an Individual	36-CA-4841 36-CA-4893
BRUCE R. GEIS, an Individual	36-CA-4907
JAMES A. PERNAR, an Individual	36-CA-4908
MARLYNN G. HUNT, an Individual	36-CA-4909
BRUCE M. HUNT, an Individual	36-CA-4910
CHARLES B. MITCHELL, an Individual	36-CA-4913
EUGENE L. HALL, an Individual	36-CA-4914
LEONARD A. LIPP, an Individual	36-CA-4918
RICHARD L. ADAMS, an Individual	36-CA-4919
PAUL G. WILLIAMS, an Individual	36-CA-4920
CHARLES K. BROWN, an Individual	36-CA-4922
SAMUEL E. BURLET, an Individual	36-CA-4923
RONALD D. ROSLING, an Individual	36-CA-4924
TOM W. HUMPHREY, an Individual	36-CA-4955

DECISION AND ORDER

On September 23, 1986, Administrative Law Judge Jay R. Pollack issued a decision in the above proceeding. The Respondent filed exceptions and a supporting brief, the Charging Party Union filed exceptions and a supporting brief, and the Respondent and the Charging Party Union filed answering briefs.

On April 24, 1987, the Board remanded this proceeding to the judge for the making of additional findings and conclusions. On July 22, 1987, the judge issued a supplemental decision. The Respondent filed exceptions and a supporting brief, and the Charging Party Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the

supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that the Respondent unlawfully failed to offer unreinstated strikers an opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on the jobs and that final determination as to the reinstatement of individual employees and possible backpay liability is properly left to compliance. In view of the nature of the violation, we shall modify the judge's recommended remedy and substitute a new Order to conform to the violation found.

Under the circumstances of this case, we find merit to the Respondent's contention that inclusion of a visitatorial provision, as recommended by the judge, is not appropriate. *Cherokee Marine Terminal*, 287 NLRB No. 53 (Jan. 28,

conclusions,[2] as modified, but not to adopt the recommended Order.

The Remedy

Having found that the Respondent, Gilmore Steel Corporation d/b/a/ Oregon Steel Mills, Inc. has engaged in certain unfair labor practices, we shall order it to cease and

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1988).

[2] The parties agreed, as part of their partial settlement of the complaint, that the judge would decide whether striking employees were entitled to vacation pay at the wage rate existing during their last payroll quarter of work. The parties further agreed that the judge would decide this remedial issue on the basis of his construction of pertinent contract language and on the parties' past practice. Because of the uncontradicted evidence of a past practice tied to employees' last payroll quarter of work and in view of the ambiguties [sic] in the language of the contract as applied to these circumstances, we find the judge's resolution of this issue, as agreed to by the parties, to be reasonable and, thus, find no basis to disturb his conclusion.

desist and take certain affirmative action to effectuate the policies of the Act.

The Respondent shall be ordered to offer reinstatement to the strikers who, at the compliance stage of this proceeding, are determined to have been denied reinstatement as a consequence of the Respondent's failure to offer them an opportunity to bid on job vacancies and make whole all such strikers for any loss of pay and benefits they may have suffered by reason of the Respondent's discrimination against them, such payment to be made in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in New Horizons for the Retarded.[3]

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[3] 283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts

Further, Respondent shall be ordered to pay the striking employees vacation pay at the wage rate determined by their last payroll quarter worked according to the settlement agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Gilmore Steel Corporation d/b/a Oregon Steel Mills, Inc., Portland, Oregon, it [sic] officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to offer to qualified unreinstated strikers the opportunity to bid on job vacancies until after nonstrikers and strike replacements have failed to bid on such jobs.

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accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer reinstatement and backpay to any strikers who, at the compliance stage of this proceeding, are determined to have been denied reinstatement as a consequence of the Respondent's failure to offer them an opportunity to bid on job vacancies in the manner set forth in the remedy section of the decision.

(b) To the extent it has not already done so, pay the striking employees, pursuant to the settlement agreement in these cases, vacation pay at the wage determined by their last pay quarter.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Portland, Oregon, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint and bill of particulars are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. September 30, 1988.

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to offer to qualified unreinstated strikers the opportunity to bid on

job vacancies in preference to nonstrikers and strike replacements on the payroll.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer reinstatement and backpay, with interest, to any strikers who were unlawfully denied reinstatement as a consequence of our failure to offer them an opportunity to bid upon job vacancies because we preferred nonstrikers and strike replacements then on the payroll.

GILMORE STEEL CORPORATION
d/b/a OREGON STEEL MILLS, INC.
_____
(Employer)

Dated _____ By _____
(Representative)
(Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 Second Avenue, Room 2948, Seattle, WA 98174-1078, telephone: (206) 442-7472.

APPENDIX C
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

GILMORE STEEL CORPORATION d/b/a OREGON STEEL MILLS, INC. and UNITED STEELWORKERS OF AMERICA, AFL-CIO	Cases 36-CA-4837 36-CA-4938
MARILYN K. McGAHAN, an Individual	36-CA-4841 36-CA-4893
BRUCE R. GEIS, an Individual	36-CA-4907
JAMES A. PERNAR, an Individual	36-CA-4908
MARLYNN G. HUNT, an Individual	36-CA-4909
BRUCE M. HUNT, an Individual	36-CA-4910
CHARLES B. MITCHELL, an Individual	36-CA-4913
EUGENE L. HALL, an Individual	36-CA-4914
LEONARD A. LIPP, an Individual	36-CA-4918
RICHARD L. ADAMS, an Individual	36-CA-4919
PAUL G. WILLIAMS, an Individual	36-CA-4920
CHARLES K. BROWN, an Individual	36-CA-4922
SAMUEL E. BURLET, an Individual	36-CA-4923
RONALD D. ROSLING, an Individual	36-CA-4924
TOM W. HUMPHREY, an Individual	36-CA-4955

Patrick F. Dunham, Esq. and Joseph N. Marra, Esq., of Seattle, WA, for the General Counsel.

Don S. Willner, Esq., of Portland, OR, for the Union.

Wayne D. Landsverk, Esq. and Verne W. Newcomb, Esq. (Newcomb, Sabin, Schwartz & Landsverk), of Portland, OR, for the Respondent.

Dennis J. Sousa, Esq., of Portland, OR, for Marilyn K. McGahan.

DECISION
Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard these consolidated cases in trial at Portland, Oregon on November 4, 1985, January 27 through 30, and February 18 through 20, 1986. The cases arose as follows: United Steelworkers of America, AFL-CIO (the Union) filed a charge in Case 36-CA-4837 on December 31, 1984 against Gilman [sic] Steel Corporation d/b/a Oregon Steel Mills, Inc. (Respondent). On January 9, 1985, Marilyn K. McGahan filed a charge against

Respondent in Case 36-CA-4841. On April 3, 1985, McGahan filed a charge in Case 36-CA-4893 against Respondent. On April 19 Bruce Geis filed a charge against Respondent in Case 36-CA-4907. On April 22 James A. Pernar, Marlynn G. Hunt and Bruce M. Hunt filed charges against Respondent in Cases 36-CA-4908, 36-CA-4909 and 36-CA-4910, respectively. On April 23, Charles B. Mitchell and Eugene L. Hall filed charges against Respondent in Cases 36-CA-4913 and 36-CA-4914, respectively. On April 29 Leonard A. Lipp filed a charge in Case 36-CA-4918 against Respondent. On April 30 Richard L. Adams and Paul G. Williams filed charges against Respondent in Cases 36-CA-4919 and 36-CA-4920. Cases 36-CA-4922, 36-CA-4923 and 36-CA-4924 were filed on May 1 by Charles K. Brown, Samuel E. Burlet and Ronald R. Rosling. On May 9, the Union filed Case 36-CA-4938. The

Union filed a supplemental charge against Respondent in Case 36-CA-4938 on May 21. On May 20, Tom W. Humphrey filed a charge against Respondent in Case 36-CA-4955. On July 19, 1985 the Regional Director for Region 19 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing in all of the above-mentioned cases.

On November 4, 1985, I opened the hearing. At that time the parties reached a settlement regarding the complaint allegation that Respondent had unlawfully coerced striking employees into resigning, and thereby giving up their recall rights, in order to obtain vacation pay. Without admitting wrongdoing, Respondent agreed to reinstate the recall rights of those employees who had resigned in order to obtain their vacation pay and to pay

vacation pay to all eligible employees. The parties left to the Judge to determine whether the strikers should be paid vacation pay at the former contract wage rates or at the new lower wage rates presently paid by Respondent. The parties agreed that the matter would be decided "as a matter of interpretation of the contract which includes past practices."

Further, the parties agreed that the General Counsel would issue a bill of particulars regarding the complaint allegation that Respondent had unlawfully failed to reinstate economic strikers in accordance with their rights under the *Laidlaw* case.[1] The procedure agreed to by the parties provided for an answer to the bill of particulars by Respondent and a

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[1] *Laidlaw Corporation*, 171 NLRB 1366 (1968), enforced 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

hearing, thereafter, based upon the issues raised by these supplemental pleadings.

The bill of particulars alleged that Respondent violated Section 8(a)(3) and (1) of the Act by not recalling former strikers in three categories. First, the General Counsel and Union argued that Respondent was obligated to fill permanent jobs by recalling employees from the list of unreinstated strikers in order of seniority. Second, the General Counsel and Union argued that Respondent was obligated to fill its permanent bid jobs by recalling qualified employees from the list of unreinstated strikers or at least by allowing such strikers to bid on these jobs. The third category of jobs was temporary bid jobs and again the General Counsel and Union argued that these jobs, not involving the hiring of additional employees, should have been given to

unreinstated strikers or at least been put up for bid by these strikers. Finally, General Counsel alleged that the strikers were entitled to vacation pay at the wage rate said employees received during their last prior quarter of work (under the expired agreement between the Union and Respondent).

Respondent denied that it had any obligation to reinstate strikers on the basis of seniority and contended that as long as it did not discriminate on the basis of union activity, it could use any criteria it wished in recalling unreinstated strikers. With respect to the bidding of permanent and temporary jobs, Respondent argued that it could not be required to increase its work force particularly in the face of a business down turn. Further, Respondent contended that certain of the allegations regarding

its failure to reinstate strikers were barred by the 6-month statute of limitations contained in Section 10(b) of the Act. Regarding the vacation pay to be paid to the strikers, Respondent contended that the proper wage rates are the wage rates presently paid by the company which were used in paying vacation pay to nonstrikers and strike replacements.

As mentioned earlier, the hearing was conducted on these issues on various dates in January and February 1986 in Portland, Oregon.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Based upon the entire record, and from my observation of the demeanor of the witnesses and after due consideration of the briefs filed on

behalf of the parties, I make the following:

Findings of Fact and Conclusions

I. Jurisdiction

Respondent is a Delaware corporation with an office and principal place of business in Portland, Oregon where it is engaged in the business of manufacturing steel. During the 12 months prior to the issuance of the complaint, Respondent purchased goods and materials valued in excess of $50,000 directly from sources outside the State or from suppliers within the State which in turn obtained such goods and materials directly from sources outside Oregon. Accordingly, I find Respondent at all times material herein has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Further, I find that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background and Issues

Respondent operates a steel mill in Portland, Oregon, which employs between 500 and 600 employees. For many years Respondent's production and maintenance employees were represented by Local 3010 of the Union and the clerical and laboratory employees were represented by the Union's Local 6380. The last collective-bargaining agreements for the production and maintenance and clerical and laboratory units each expired on September 1, 1983. On September 9, 1983, both the unit represented by Local 3010 and the unit represented by Local 6380 commenced a strike against Respondent.

Respondent continued to operate during the strike with employees that crossed the picket line, permanent replacements and, in the clerical unit, a few employees from an agency providing temporary employees. On June 26, 1984, the Union, on behalf of all the employees in both units, made an unconditional offer to return to work. A collective-bargaining agreement was not executed and in January 1985, Local 3010 and Local 6380 were each decertified as the collective bargaining representative in its respective unit.

At the end of the strike Respondent did not have positions for the former strikers. With one exception, when there were openings, Respondent recalled strikers from the list of unreinstated strikers, hereinafter referred to as the

Laidlaw list.[2] As mentioned earlier, the General Counsel and Union argue that Respondent violated Section 8(a)(3) and (1) of the Act by not recalling former strikers pursuant to seniority. They contend that Respondent was obligated to follow its past practice regarding recall from layoff in recalling strikers from the *Laidlaw* list.

Following the strike, Respondent, suffering business losses, attempted to reduce the size of its work force. When job vacancies arose, Respondent attempted to fill these positions from within the plant without recalling strikers, thereby decreasing its total work force. All such positions were posted in the plant for

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[2] The one exception involved the hiring of a chemist. Respondent hired a new employee because there was no chemist on the *Laidlaw* list at the time of this job opening.

employees to bid on them. The bidding was limited to employees actually working. Thus, former strikers not yet recalled were not permitted to bid on these jobs. General Counsel and the Union contend that by limiting the bidding to current employees, Respondent granted superseniority to replacements and employees who crossed the picket line as opposed to strikers.

B. The Failure to Follow Seniority in Recalling Former Strikers

An employer faced with a strike has a legitimate and substantial right to continue his business by hiring replacements for his striking employees. "He is not bound to discharge those hired to fill the place of strikers, upon the election of the latter to resume their employment." *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). However, at the conclusion of a

strike, even if permanent replacements have been hired for the strikers, upon the departure of said replacements, the former strikers are entitled to reinstatement to their former jobs unless they have acquired substantially equivalent employment elsewhere or unless their employer is able to sustain his burden of proof that the failure to recall was justified by legitimate and substantial business reasons. *Laidlaw, supra; NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967). In fact, not only are former strikers entitled to vacant jobs, "... it's incumbent upon [their employer] to seek them out as positions [are] vacated." *Laidlaw, supra* at 1369. Unless an employer sustains his burden of proof, a refusal to reinstate employees after an economic strike constitutes an unfair labor practice notwithstanding the absence

of animus or bad faith; for such conduct "discourages employees from exercising their rights to organize and to strike guaranteed by Section 7 and 13 of the Act..." *Fleetwood Trailer, supra* at 378.

Prior to the decertification of the Unions, Respondent followed seniority in recalling strikers to fill vacancies in its production unit. After the decertification of the Unions, Respondent used merit or performance to determine the individual employees to be recalled from the *Laidlaw* list. In the clerical unit, vacancies for present jobs were filled in the same manner. After the decertification of the Unions, permanent jobs were put up for bid by employees on the current payroll, after such employees bid or failed to bid for these positions, Respondent filled the remaining vacancies by recalling employees from the *Laidlaw*

list based on merit rather than seniority.[3]

General Counsel and the Union argue that if an employer's past practice is to recall employees on the basis of seniority it is required to recall strikers in accordance with that past practice. Respondent argues that absent evidence of union animus, an employer has no obligation to recall strikers on the basis of seniority.

As support from their respective positions, the parties cite *Carruthers Ready Mix*, 262 NLRB 739 (1982). The Administrative Law Judge stated at page 740:

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[3] The General Counsel and Union take issue with Respondent's determination of merit. However, I find insufficient evidence to establish that Respondent's determinations based on merit were incorrect. In any event, there is no evidence that Respondent's determination of merit discriminated in any way based on union activities or other protected concerted activities.

> The General Counsel contends that the strikers should have been recalled in order of seniority. Respondent's lists were essentially alphabetical. Respondent never has operated under a seniority system and it successfully resisted a proposal by the Union that the strikers be recalled on the basis of seniority. There is no requirement in the absence of an agreement or evidence of past practice that an employer must recall returning strikers back to work on the basis of seniority. All that is required is that the employer recall its employees on a non-discriminatory basis. I therefore reject the General Counsel's contention and shall assume that the Respondent has the right to recall employees in any order it wishes absent discrimination on the basis of union or protected concerted activity.

In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court stated that no proof of union animus was needed and a violation of the Act could be found "if it can reasonably be concluded that the employer's discriminatory conduct was inherently destructive of important employee rights despite evidence of business motivation." See also *Fleetwood*

Trailer, supra.

In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the Supreme Court identified a type of employer conduct where unlawful intent "is founded upon the inherently discriminatory or destructive nature of the conduct itself." The employer in *Erie Resistor* had granted "superseniority" to strike replacements and strikers who returned to work. The Court said that the grant of "superseniority" evidenced "conduct which carried its own indicia of intent and is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights." Turning to the Board's consideration of the employer's alleged business justification, the Court stated that the operative policy at work was the concern expressed in federal labor law for

the protection of the integrity of the strike weapon, "which in great measure implements and supports the principles of the collective bargaining system."

In *Bio-Science Laboratories*, 209 NLRB 796 (1984), the recently expired contract between the employer and the union provided for seniority in recall from layoff, but made no mention of recall of economic strikers. During the strike, the parties negotiated to impasse concerning the recall of the economic strikers. The union sought to have the permanent replacements terminated and the economic strikers replace them based upon the seniority provisions of the expired contract. The employer refused to terminate the permanent replacements and implemented its own reinstatement system on the day the strike ended. Under the reinstatement system, the employer looked

first to former strikers who had worked at the time of the strike in the job classification and section in which the vacancy occurred and offered reinstatement to the employees with the highest plantwide seniority among that group. The Board found no discrimination against employees with the most seniority and no attempt by Bio-Science to undermine its union, nor any unlawful motivation, nor conduct inherently destructive of employee rights. See 209 NLRB at 803-04.

The Union argues that the Board case of *Fire Alert Company*, 223 NLRB 129, 130 (1976), supplementing 207 NLRB 885 (1973), stands for the proposition that an employer must reinstate economic strikers based upon seniority where that has been the employer's practice. In that case, the Board in fashioning its remedial order held:

> It is, of course, well established that seniority is a proper basis for determining reinstatement rights for backpay purposes, absent a showing that Respondent had some other economically justified basis.

The Board used seniority in *Fire Alert* to fashion a remedy after it found that the employer had unlawfully hired two employees instead of reinstating two economic strikers. The Board was not faced with the issue of whether in reinstating strikers the employer must follow seniority. The Board used seniority in *Fire Alert* to determine the two employees who had been discriminated against by the employer's hiring of new employees. The employer in that case had not demonstrated any basis for choosing employees for reinstatement other than seniority.

As stated earlier, in *Carruthers Ready Mix, supra*, the Board approved the Administrative Law Judge's finding "there

is no requirement in the absence of an agreement or evidence of past practice that an employer must recall returning strikers back to work on the basis of seniority." In *Carruthers* the issue of what weight to give past practice was not presented. Further, the issue of whether past practice survives a decertification was not presented in *Carruthers*. See also *Kennedy & Cohen of Georgia, Inc.*, 218 NLRB 1175 (1975); *Foote & Davies, Inc.*, 278 NLRB No. 12 (1986); *Garrett Railroad Car*, 275 NLRB No. 151 (1985).

Foote & Davies, Inc., 278 NLRB No. 12 (1986) cited by the Union is inapposite. In that case the employer failed to reinstate a sympathy striker in accordance with the seniority provisions of an existing contract. When the Board found that the employer had failed to reinstate the employee according to the company's

own seniority system and practice, the Board was referring to an existing collective-bargaining agreement. The difficulties in the instant case arise because the past practice applied to recall from layoff as opposed to recall from a strike and are further complicated by the fact that the Union was decertified. The Respondent did apply the past practice prior to decertification but changed its method of choosing between unreinstated strikers after the Union was decertified, at a time when Respondent could unilaterally change terms and conditions of employment without bargaining with the Union.

Thus, the question becomes whether Respondent's change in the manner in which it chose between unreinstated strikers is inherently destructive of the rights of the strikers. The fact that senior

employees, those that presumably belonged to the Union for a longer period of time, suffer most by this change, does not establish a violation because that argument was specifically rejected by the Board in *Bio-Science Laboratories*. The fact that employees have less favorable terms and conditions than at the outset of the strike is also not sufficient to establish a violation. Once the parties were at impasse the Respondent could lawfully institute unilateral changes so long as they were first offered to the Union. See, e.g., *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enforcement denied on other grounds, 500 F.2d 181 (5th Cir. 1974); *Carlsen Porsche Audi, Inc.*, 266 NLRB 141 (1985); *Ace Galvanizing, Inc.*, 217 NLRB 144 (1975). Once the Union was decertified the Respondent could unilaterally change terms and conditions

of employment. Respondent could simply not discriminate against the strikers.

A recent case, *Lone Star Industries, Inc.*, 279 NLRB No. 78 (April 28, 1986), which issued after the submission of briefs in the instant case, illustrates these points. In that case, the Board rejected the "General Counsel's universal theory that an employer's failure to recall strikers by seniority violates the Act unless the employer proves a substantial and legitimate business justification for an alternate recall system." Id., Slip op. at p. 5. The Board reasoned as follows:

> Apart from obligations imposed by unilateral practice or through the collective bargaining process, there is nothing in the Act itself or in the Board's articulation of *Laidlaw* rights that establishes an individual economic striker's right to recall by seniority. [Citations omitted.] Barring a simultaneous recall of all former strikers, there will necessarily be discrimination within the striker's class as to the order

> of individual returns to the workplace, whether recall is by seniority, merit, age or alphabetical order. This discrimination is not prima facie proof of unlawful motivation because it does not adversely affect employee rights even 'to some extent.' Consequently, before any burden of justification for failing to recall a striker by seniority can be imposed on a respondent, the General Counsel must establish the existence of a seniority recall right by reference to a collective-bargaining agreement or a binding established past practice. Id. at pp. 5-6.

The Board went on to conclude that even assuming the existence of a seniority recall agreement between Lone Star and its unions or of a consistent practice of recall by seniority, the Company was free to unilaterally change such agreement or practice after its lawful withdrawal of recognition of the unions. Most important, the Board held that Lone Star was "free to devise a new recall procedure as long as it was applied consistently." The *Lone Star* case is controlling as to

the allegation here that Respondent failed to recall former strikers on the basis of seniority. Even assuming a past practice of recall by seniority, once the Unions were decertified, Respondent could devise a new recall procedure--one based on merit or performance as opposed to seniority--as long as the procedure was applied nondiscriminatorily. The record herein reveals no evidence that Respondent discriminated in recalling employees from the *Laidlaw* list on the basis of union activity or that Respondent engaged in any other discrimination prohibited by the Act.

C. The Bid Job

General Counsel contends that the failure to include economic strikers in the job-bid process must be viewed as a grant of "superseniority" to strike replacements. Respondent argues that

restricting bidding to employees currently in plant has always been its practice. Further, Respondent argues that based on its economic conditions--including its decreasing work force--it was privileged to reassign employees rather than reinstate strikers which would necessitate bumping or laying off other employees.

In *Transport Company of Texas*, 177 NLRB 180, enforced 438 F.2d 258 (5th Cir. 1971), the employer recalled the economic strikers, but in a subsequent reduction in force, selected strikers for layoff while retaining nonstrikers and striker replacements. The Board found the selection of the strikers for layoff placed them in a subordinate position because they had engaged in a strike and granted the nonstrikers and replacements superseniority. The Board found that the "strikers were not given the 'full and

complete' reinstatement due them because they were placed in a subordinate class distinguished only by the exercise of their statutory rights. Such conduct is inherently destructive of employee rights."

In *Wisconsin Packing Company*, 231 NLRB 546 (1973), the Board found a violation where the employer transferred or recalled laid off employees for jobs which more senior unrecalled strikers were capable of performing and for which the strikers had unconditionally applied. The Board found the employer's conduct to be tantamount to the granting of superseniority in *Erie Resistor* and *Transport Company of Texas*. The Board held that the employer had unlawfully granted to nonstrikers and replacements superseniority and had unlawfully treated the strikers as new employees.

In *MCC Pacific Valves*, 244 NLRB 931 (1979), shortly after the strike ended, the employer posted jobs for bidding by employees then on the payroll, including permanent strike replacements and reinstated strikers. At the time these jobs were posted, there remained a number of strikers who had not yet been reinstated and who were, in fact, qualified to perform the posted jobs. However some posted jobs were not offered to unreinstated strikers at all, and others were offered to them only if there were no successful bidders on those jobs within the plant. Additionally, in a number of cases, unreinstated strikers were not permitted to bid on the initial jobs but were invited to bid on the jobs created at the lowest end of the classification scale after employees on the payroll had concluded the bidding

process.

The Board held, with respect to job vacancies as a result of the departure of strike replacements for those jobs, the employer was not entitled to prefer strike replacements then on the payroll to qualified strikers awaiting reinstatement. The employer could not bypass qualified unreinstated strikers by waiting to make a job offer to them only if there were no successful bidders from among the active strike replacements nor could it wait until the chain reaction effect had run its course before offering the "final" job to a striker awaiting recall. The employer was obligated to offer the initial job vacancies created by the departure of strike replacements to unreinstated, qualified strikers. The Board noted that not every job opening is one that an unreinstated striker, though

qualified, is entitled to fill. There may be circumstances, for example, in which the rights of unreinstated strikers may conflict with the rights of those strikers who have been reinstated or even with the rights of permanent striker replacements. The Board found it unnecessary under the circumstances of the *MCC* case to reach and pass on these issues. (244 NLRB 931, 934, fn. 15) However, the instant case appears to present situations where the rights of unreinstated strikers conflict with reinstated strikers, nonstrikers and permanent replacements. Moreover, the Respondent in the instant case was, in many instances, transferring and reassigning employees but not filling vacancies. Therefore, in most instances, if Respondent were required to give all bids to unreinstated strikers, the result would be the bumping down and layoff of

other employees.

In *Randall, Burkart/Randall, Division of Textron, Inc.*, 257 NLRB 1 (1981), the Board found that the employer violated Section 8(a)(1) and (3) of the Act when, with respect to special rated or bid jobs, the employer filled such jobs by first offering them to employees on the existing payroll rather than to qualified strikers awaiting reinstatement. The Board found it irrelevant whether the special rated job arose as a result of a departure from the plant of a permanent replacement or a reinstated striker, or whether it arose from a need by the employer to add to its work force. The important fact was that an opening arose for which a striker was qualified and available, and that such a striker was denied the opportunity to even bid for the job.

With regard to permanent transfers

not involving special rated jobs, the Board found no violation. The employer had business reasons for moving similarly rated employees freely within the plant. The employer there had no obligation to honor the provisions of the expired contract and had not executed a strike settlement agreement or new contract with its union. Finally, the Board noted that the transferees included return strikers and the Board could find no violation of Section 8(a)(3) in transferring a returned striker rather than recalling an unreinstated striker in the absence of a plan or scheme to avoid reinstatement of strikers. On appeal the United States Court of Appeals for the Eighth Circuit affirmed the Board and rejected the employer's argument that its reinstatement policy was not discriminatory. The Court emphasized that the practical effect of

the employer's procedure was to make it less likely that strikers would be reinstated to better paying positions. 687 F.2d 1240 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983). See *Harvey Engineering Corp.*, 270 NLRB 1290, 1292-1293 (1984).

In *Bancroft Corp. Co.*, 245 NLRB 547 (1979), the Board found that an employer did not commit an unfair labor practice in recalling laid off replacement workers before reinstating strikers. The recall of a laid off employee did not create a "vacancy" such as to trigger the recall right of an unreinstated striker. The layoffs were for periods of only 2 to 7 days and were due to shortages of materials. In *Giddings & Lewis, Inc.*, 255 NLRB 742 (1981), enforcement denied, 675 F.2d 926 (7th Cir. 1982), the Board found a violation in an employer's seniority

rules which provided, in the event of a layoff, permanent replacements and reinstated strikers would be recalled on the basis of seniority, in preference to more senior unreinstated strikers. The Board found that this plan granted superseniority to the laid off employees in violation of Section 8(a)(3). The Court of Appeals for the Seventh Circuit reversed the Board finding that the seniority rules served "only to assure replacements the permanent status to which *Mckay* says they are entitled. Affirmance of the Board's holding that layoffs activate striker's right to reinstatement would eviscerate the *Macay* rule. Employers attempting to hire replacement workers could guarantee them employment only until a layoff occurred. Such replacement workers could hardly be called 'permanent'." In *Foote & Davies, Inc.*,

supra, 278 NLRB No. 12, the Board held that the Seventh Circuit *Giddings & Lewis* decision was limited to layoffs of permanent strike replacements and did not apply to vacancies created by the resignation of regular employees.

In *Overhead Door Corporation*, 261 NLRB 657 (1982), the Board adopted the following discussion of the administrative law judge involving the transfer and assignment of employees by an employer faced with requests by economic strikers to return to work:

> Under the Board decisions in *Pillows of California*, 207 NLRB 369 (1973) and *Kennedy & Cohen of Georgia, Inc.*, 218 NLRB 1175 (1975), an employer faced with requests to work may lawfully fill vacancies which arise in his plant by the nondiscriminatory transfer, promotion, or demotion of employees already working, so long as it does not hire new employees to fill the slots vacated by in-house transfers. With the exceptions noted above, this did not occur here. A lawful transfer situation normally arises only when there is a business down turn which would allow the

> company to continue its operations with a reduced work force. It can also happen when, as here, an entire function, such as policing the plant premises with specifically designated employees, had been discontinued. Unlike the situation found in *Randall, Burkart/Randall, Division of Textron, Inc.*, 257 NLRB 1 (1981), the respondent in this case hired the transferred employees originally as production workers, assigned them to pull guard duty, and then transferred them back to the production floor.... The individuals were, in effect, production workers on temporary loan to the supervisor in charge of plant security.... As they were permanent employees, the employer had no obligation to terminate them in order to accommodate economic strikers who wished to return. *NLRB v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938). [261 NLRB at 664-65.]

Applying the facts of this case to the above legal principles, I find that Respondent violated the Act when it posted permanent job vacancies only for employees on the payroll and did not open the jobs for unreinstated strikers until after the nonstrikers and replacements had passed on the bid opportunities. During the period of September 10, 1984 through December

1985 Respondent admittedly had vacancies in clerical unit positions and bid these jobs. The unreinstated strikers were not given an opportunity to bid. Thereafter, when no employee bid on the job a striker was recalled. The strikers were not recalled on the basis of seniority but rather on Respondent's view of the best qualified person for the job.

In the production unit, Respondent filled jobs by bidding within the plant. Thus, the employees then on the payroll had preference for the better jobs. In most cases no employees were added to the payroll. When employees were recalled from the *Laidlaw* list, it would be to jobs left vacant by either the transfer of employees on the payroll or the failure of employees to bid on jobs. The effect was that strikers were only recalled to less favorable jobs.

With respect to bid jobs that were filled by the transfer or reassignment of employees without an addition to the work force, I find Respondent's conduct justified by substantial business reasons. In the business down turn, Respondent was increasing its productivity and decreasing its work force. It could, therefore, nondiscriminatorily transfer employees without recalling unreinstated strikers. To hold otherwise would require Respondent to create vacancies for the unreinstated strikers and then lay off nonstrikers and replacements as a result of such transfers. *Laidlaw* does not create such rights for unreinstated strikers and should not be used to force Respondent to utilize such poor business measures.[4]

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[4] In its bill of particulars, General Counsel argued that even temporary bids, where the Respondent did not add to its work force but rather reassigned and transferred employees on a temporary and

Respondent contends that it has always awarded bids to employees internally and has not extended even extended bids to outside the plant. However, Respondent never before was faced with the situation of having unreinstated strikers awaiting recall pursuant to their *Laidlaw* rights.

Respondent further contends that the Union agreed to continue the bidding practices. However, the Union and Respondent never reached either a strike settlement or collective-bargaining agreement. Further, the Union and Respondent never discussed the bidding

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indefinite basis, should have been opened for bidding to unreinstated strikers. Apparently, General Counsel has abandoned that argument. In any event, it seems clear from the analysis and conclusions above, that Respondent need not recall unreinstated strikers for temporary bids that do not increase the work force. See also *Coastside Scavenger Company*, 273 NLRB No. 198 (1985).

practice in the context of a *Laidlaw* list. A waiver of the employees' *Laidlaw* rights cannot be inferred from these circumstances.

D. The Section 10(b) Issue

Respondent claims that the first four bids in the clerical area, found unlawful above, were posted and awarded more than 6 months before the filing of the charge and thus are barred by the 6-month limitations of Section 10(b) of the Act. The parties agree that Section 10(b) does not bar any allegation which was not within the knowledge of or which could not have been discovered by the charging parties with reasonable diligence. See e.g., *Wisconsin River Valley District Council*, 211 NLRB 222, 227 (1974). Glen Shuck and Dan Hunker, the president of the production and maintenance, and clerical and laboratory units, respectively, both

testified that they did not know of a bidding procedure until "late March or early April of 1985." Moreover, it appears that the permanent clerical jobs found unlawful herein, on the ground that they were offered to unreinstated strikers after no employees had bid for the jobs, were not known by General Counsel and the union to have been placed for bid prior to the recall of strikers. The Union and General Counsel had originally based their claims on the ground that the most senior qualified employee was entitled to be recalled. I find no evidence that the Union had any knowledge of this particular conduct prior to 6 months before filing the instant charges.

E. The Employees Are Entitled to 17 Percent More Vacation Pay

As the issues were formed by the parties as part of their partial settlement, I am required to determine if

the collective-bargaining agreement and past practice required the payment of the old contract rate of pay or the payment of the unilaterally implemented 17 percent pay reduction for the payment of vacation pay.

The evidence presented by the Union establishes that prior to the strike when an employee received vacation pay it was always paid at the rate of pay earned by that employee during her or his last prior quarter of work. That was true whether the employee subsequently received a wage increase or wage decrease. Respondent's evidence was simply that the strikers were treated the same as all other employees and received the lower wage rate. However, under the past practice, the employees in question were entitled to vacation pay at the wage rate they received during their last quarter of

work, a rate of pay 17 percent more than Respondent has paid. Accordingly, I will order Respondent to pay the employees the additional vacation pay due under the settlement agreement.

F. The One Job Filled by A New Hire

As stated earlier during the relevant time period, Respondent filled all vacancies by recalling strikers, with one exception. In May 1985, a vacancy was created for the job of chemist but there were no qualified employees on the *Laidlaw* list. Dennis Johnson, a chemist and an unreinstated striker, had resigned prior to the vacancy.[5] The General Counsel and Union argue that Johnson should have been recalled in September 1984 as a lab test report clerk and, therefore, would have

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[5] As part of the settlement, Respondent had agreed to again place Johnson on the list of unrecalled strikers.

been in the plant when the chemist job became available. Respondent asserts that it did not recall Johnson because he did not possess the necessary typing skills to perform that job.

The issue becomes whether Respondent was obligated to recall Johnson, a professional, to a vacancy in a clerical job. The Board has held that an employee is entitled to a substantially equivalent job but not a job for which he is overqualified. See *New Era Electric Coop. Inc.*, 217 NLRB 477, n. 1 (1975). Accordingly, I find Respondent was not obligated to recall Johnson to the lab test report clerk job and need not decide whether Johnson had the necessary typing skills to perform that job.

The Remedy

Having found that Respondent, Gilmore Steel Corporation d/b/a Oregon Steel

Mills, Inc., has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent shall be ordered to offer reinstatement to the strikers who, at the compliance stage of this proceeding, are discovered to have been denied an opportunity to bid upon job vacancies[6] and make whole all such strikers for any loss of pay they may have suffered by reason of Respondent's discrimination against them, such payment to be made in accordance with *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon in the manner prescribed in *Florida Steel*

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[6] See e.g., *Randall, Burkart/Randall, supra.*

Corporation, 231 NLRB 651 (1977).[7]

Further, Respondent shall be ordered to pay the employees the vacation pay at the higher rate according to the settlement agreement.

Finally, General Counsel requests a "visitorial clause" in the recommended Order authorizing the Board, for compliance purposes, to obtain discovery from Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States Court of Appeals enforcing the Board's Order. Inasmuch as the remedial order requires a further determination of the identity of the individuals who have suffered a loss as a result of the conduct found unlawful above, such an order appears appropriate in this case. See *Hilton Inn North*, 279

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[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

NLRB No. 9, Slip op. p. 2, n. 3 (1986).

Conclusions of Law

1. Gilmore Steel Corporation d/b/a Oregon Steel Mills, Inc. is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO and its Locals 3010 and 6380 are labor organizations within the meaning of Section 2(5) of the Act.

3. By failing and refusing to offer unreinstated strikers the opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on such jobs, Respondent violated Section 8(a)(3) and (1) of the Act.

4. Respondent has not, except as specifically found above, violated the Act as alleged in the complaint and bill of

particulars.

ORDER[8]

The Respondent, Gilmore Steel Corporation d/b/a Oregon Steel Mills, Inc., Portland, Oregon, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Refusing to offer to qualified unreinstated strikers the opportunity to bid on job vacancies until after nonstrikers and strike replacements have failed to bid on such jobs.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the

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[8] All motions inconsistent with this Order are hereby denied. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

a. Offer reinstatement and backpay to any strikers who, at the compliance stage of this proceeding, are discovered to have been denied an opportunity to bid upon job vacancies, in the manner set forth in the section of this decision entitled "The Remedy."

b. To the extent it has not already done so, pay the striking employees, pursuant to the settlement agreement in these cases, vacation pay at the wage determined by their last pay quarter.

c. Post at its plant in Portland, Oregon, copies of the attached

notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

d. Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order what steps

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[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent has taken to comply herewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized agents, may obtain discovery from Respondent, its officers, agents, successors or assign, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order, as enforced by the Court.

IT IS FURTHER ORDERED that the consolidated complaint and bill of particulars be dismissed insofar as they allege violations of the Act not specifically found herein.

Dated: September 23, 1986.

JAY R. POLLACK
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to offer to qualified unreinstated strikers the opportunity to bid on job vacancies in preference to nonstrikers and strike replacements on the

payroll.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them under the National Labor Relations Act as set forth above.

WE WILL offer reinstatement and backpay, with interest, to any strikers who were unlawfully denied an opportunity to bid upon job vacancies because we preferred nonstrikers and strike replacements then on the payroll.

GILMORE STEEL CORPORATION
d/b/a OREGON STEEL MILLS, INC.
(Employer)

Dated _____ By _____
(Representative)
(Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or

covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 Second Avenue, Room 2948, Seattle, WA 98174; telephone: (206) 442-7472.

APPENDIX D
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GILMORE STEEL CORPORATION
d/b/a OREGON STEEL MILLS, INC.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO	Cases 36-CA-4837 36-CA-4938
MARILYN K. McGAHAN, an Individual	36-CA-4841 36-CA-4893
BRUCE R. GEIS, an Individual	36-CA-4907
JAMES A. PERNAR, an Individual	36-CA-4908
MARLYNN G. HUNT, an Individual	36-CA-4909
BRUCE M. HUNT, an Individual	36-CA-4910
CHARLES B. MITCHELL, an Individual	36-CA-4913
EUGENE L. HALL, an Individual	36-CA-4914
LEONARD A. LIPP, an Individual	36-CA-4918
RICHARD L. ADAMS, an Individual	36-CA-4919
PAUL G. WILLIAMS, an Individual	36-CA-4920
CHARLES K. BROWN, an Individual	36-CA-4922
SAMUEL E. BURLET, an Individual	36-CA-4923
RONALD D. ROSLING, an Individual	36-CA-4924
TOM W. HUMPHREY, an Individual	36-CA-4955

ORDER REMANDING PROCEEDING TO
ADMINISTRATIVE LAW JUDGE

On 23 September 1986 Administrative Law Judge Jay R. Pollack issued his decision in the above proceeding. The Respondent filed exceptions and a supporting brief, the Charging Party Union filed exceptions and a supporting brief, and the Respondent and Charging Party Union filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the decision and the record in light of the exceptions and briefs and has decided to remand the proceeding to the judge for further findings of fact, credibility resolutions and, if appropriate, new conclusions of law and recommendations.

Pursuant to a hearing conducted on the consolidated complaint and a bill of

particulars, the judge issued his decision and order. The judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to offer unreinstated strikers the opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on such jobs.

Our review of the record discloses that the judge failed to consider certain evidence and make certain credibility findings, as follows. The Respondent presented evidence, including testimony by employee relations manager Jack Longbine, vice-president of manufacturing Robert J. Sikora, general foreman Joe Corvin, and plate mill superintendent Michael D. Morris, in support of its contention that its bidding procedure for permanent job vacancies, as applied to unreinstated strikers, was justified by legitimate and substantial

business reasons. The Respondent contends that, consistent with the testimony of its witnesses, there have been major changes in equipment and job functions since a strike commencing 9 September 1983, that virtually every job open for bid has changed in content since the strike, that the jobs are not the same now as they were prior to the strike, that unreinstated strikers were no longer qualified to perform the new jobs and operate the new equipment, and that its bidding procedure was essential to its survival. Thus, the Respondent contends that it did not violate the Act because the record supports its contention that its bidding procedure was justified by legitimate and substantial business reasons.

In contrast to the position of the Respondent, the General Counsel and the Charging Party Union presented numerous witnesses, including employees Harold E. Adams,

Jack R. Gibson, Dennis Prather, Gerald Andreas, Phillip Bell, Ted Metzner, Edward Enze, and Glen I. Markle, Jr., in support of the contention that the skills needed in the production and maintenance process remained the same. Thus, the Charging Party Union contends, based on the foregoing, that the Respondent's assertion that its bidding procedure was supported by considerations of efficiency is "unbelievable."

In considering the allegations of the consolidated complaint and the bill of particulars regarding the Respondent's bidding procedure, as it applied to the posting of permanent job vacancies, the judge made no direct reference to the testimony of the foregoing witnesses, made no credibility resolutions, and made no findings of fact, with regard to the evidence presented in support of, and in response to, the Respondent's alleged

legitimate and substantial business justification in the foregoing respects.

In light of the above, we shall remand this proceeding to the judge and order that he prepare a supplemental decision containing findings of fact and credibility resolutions and, if appropriate, new conclusions of law and recommendations, with regard to the Respondent's job bidding procedure as applied to permanent job vacancies and to the alleged legitimate and substantial business reasons presented in support thereof. In view of our determination to remand the proceeding, we find it unnecessary at this time to pass on the remaining issues presented in the exceptions and briefs.

ORDER

IT IS ORDERED that the above-captioned proceeding be remanded to Administrative Law Judge Jay R. Pollack for the limited purpose of

making credibility determinations and making findings of fact, conclusions of law, and recommendations concerning the conduct alleged in the consolidated complaint and bill of particulars in accordance with the above discussion of our review of the record.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a Supplemental Decision setting forth the resolutions of such credibility issues, findings of fact, conclusions of law, and recommendations, including a recommended order where appropriate with respect thereto. Copies of such Supplemental Decision shall be served on all the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D.C., 24 April 1987.

_____
Donald L. Dotson, Chairman

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James M. Stephens, Member

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Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX E
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

GILMORE STEEL CORPORATION d/b/a OREGON STEEL MILLS, INC.	
and	
UNITED STEELWORKERS OF AMERICA, AFL-CIO	Cases 36-CA-4837 36-CA-4938
MARILYN K. McGAHAN, an Individual	36-CA-4841 36-CA-4893
BRUCE R. GEIS, an Individual	36-CA-4907
JAMES A. PERNAR, an Individual	36-CA-4908
MARLYNN G. HUNT, an Individual	36-CA-4909
BRUCE M. HUNT, an Individual	36-CA-4910
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EUGENE L. HALL, an Individual	36-CA-4914
LEONARD A. LIPP, an Individual	36-CA-4918
RICHARD L. ADAMS, an Individual	36-CA-4919
PAUL G. WILLIAMS, an Individual	36-CA-4920
CHARLES K. BROWN, an Individual	36-CA-4922
SAMUEL E. BURLET, an Individual	36-CA-4923

RONALD D. ROSLING, an Individual — 36-CA-4924
TOM W. HUMPHREY, an Individual — 36-CA-4955

Patrick F. Dunham, Esq. and Joseph N. Marra, Esq., of Seattle, WA, for the General Counsel.

Don S. Willner, Esq., (Willner & Kelley), of Portland OR, for the Union.

Wayne D. Landsverk, Esq. and Verne W. Newcomb, Esq., (Newcomb, Sabin, Schwartz & Landsverk), of Portland, OR, for the Respondent.

Dennis J. Sousa, Esq., of Portland, OR, for Marilyn K. McGahan.

SUPPLEMENTAL DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard these consolidated cases in trial at Portland, Oregon on November 4, 1985, January 27 through 30, and February 18 through 20, 1986. On September 23, 1986 I issued my original decision[1] finding, inter alia, that Respondent, Gilmore Steel Corporation d/b/a

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[1] JD (SF)--120--86).

Oregon Steel Mills, violated Section 8(a)(3) and (1) of the Act by failing and refusing to offer unreinstated strikers the opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on such jobs. On April 24, 1987, the Board issued an unpublished Order Remanding Proceeding to Administrative Law Judge in which it remanded the case to me "for the limited purpose of making credibility determinations and making findings of fact, conclusions of law, and recommendations concerning the conduct alleged in the consolidated complaint and bill of particulars" in accordance with "the Respondent's alleged legitimate and substantial business justification" for its bidding procedure. The Board further ordered that I "prepare and serve on the parties a Supplemental Decision setting forth the resolutions of such credibility issues,

findings of fact, conclusions of law, and recommendations, including a recommended order where appropriate with respect thereto."

On June 3, 1987, the Union and Respondent filed supplemental briefs which have been carefully considered.[2] Based upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact and Conclusions

1. The Remand

The Board in its Order of April 24, 1987 gave the following explanation for the remand:

> Our review of the record discloses that the judge failed to consider certain evidence and make certain credibility findings, as follows. The respondent presented evidence, including testimony by employee relations manager Jack Longbine, vice-president of manufacturing Robert J. Sikora, general foreman Joe Corvin, and plant mill superintendent Michael D. Morris, in support of its contention that its bidding procedure

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[2] The General Counsel did not file a supplemental brief.

for permanent job vacancies, as applied to unreinstated strikers, was justified by legitimate and substantial business reasons. The Respondent contends that, consistent with the testimony of its witnesses, there have been major changes in equipment and job functions since a strike commencing 9 September 1983, that virtually every job open for bid has changed in content since the strike, that the jobs are not the same now as they were prior to the strike, that unreinstated strikers were no longer qualified to perform the new jobs and operate the new equipment, and that its bidding procedure was essential to its survival. Thus, the Respondent contends that it did not violate the Act because the record supports its contention that its bidding procedure was justified by legitimate and substantial business reasons.

In contrast to the position of the Respondent, the General Counsel and the Charging Party Union presented numerous witnesses, including employees Harold E. Adams, Jack R. Gibson, Dennis Prather, Gerald Andreas, Phillip Bell, Ted Metzner, Edward Enze, and Glen I. Markle, Jr., in support of the contention that the skills needed in the production and maintenance process remained the same. Thus, the Charging Party Union contends, based on the foregoing, that the Respondent's assertion that its bidding procedure was supported by considerations of efficiency is "unbelievable."

Accordingly , the Board remanded the proceeding for credibility resolutions and, if

appropriate, new conclusions of law and recommendations in accordance with the above discussion of its review of the record.

2. The Alleged Unfair Labor Practices

In my original decision I found that Respondent did not violate the Act in failing to recall former strikers on the basis of seniority.[3] I further found that Respondent violated the Act when it posted permanent job vacancies only for employees on the payroll and did not open the jobs for unreinstated strikers until after the nonstrikers and replacements had passed on the bid opportunities. During the period of September 10, 1984 through December 1985, Respondent admittedly had vacancies in the clerical unit positions and bid these jobs. The unreinstated strikers

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[3] This finding is not at issue in the limited remand.

were not given an opportunity to bid. Thereafter, when no employee bid on the job a striker was recalled. The strikers were not recalled on the basis of seniority but rather on Respondent's view of the best qualified person for the job.

In the production and maintenance unit, Respondent filled jobs by bidding within the plant. Thus, the employees then on the payroll had preference for the better jobs. In most cases no employees were added to the payroll. In those cases, I found Respondent's conduct justified by substantial business reasons. However, when employees were added to the payroll, the employees recalled from the *Laidlaw* list[4] were left with the lease desirable positions, i.e., positions left vacant by the

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[4] *Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

promotion of employees on the payroll or the failure of employees on the payroll to bid on jobs. I found no violation where Respondent restricted the bidding to employees on the payroll where the work force was not increased. Thus, I found no violation where bid jobs were filled by the transfer or reassignment of employees without an addition to the work force.

In finding that Respondent violated the Act by failing and refusing to offer unreinstated strikers the opportunity to bid on vacancies until after nonstrikers and strike replacements had failed to bid on such jobs, I made no finding that Respondent intended to discourage union activities. Such a finding is unnecessary. The treatment of unreinstated strikers as inferior or subservient to other employees in this case is inherently destructive of the employees' right to strike

and constitutes an unfair labor practice notwithstanding the absence of animus or bad faith unless the Employer sustains his burden of proof that the conduct was justified by legitimate and substantial business reasons. *Laidlaw, supra*; *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 380-81 (1967); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

3. Respondent's Alleged Justification for Its Inherently Destructive Conduct

A. General Findings Regarding Respondent's Defense

As the Board noted, Respondent contends that its bidding procedure was essential to its survival. However, that is argument and there is no testimony to that effect. Thomas Boklund, Respondent's president and chief executive officer, testified that Respondent limited bidding to its existing work force because "it's the practice that we followed in

the past, and it's also practiced in the industry." I find this reason given by Respondent's president, rather than the reason advanced by counsel, is the real reason for Respondent's failure to open bidding to the unreinstated strikers. The problem with Boklund's reasoning is that under *Laidlaw* and its progeny Respondent's unreinstated strikers were part of its existing work force. Respondent's practice results in treating unreinstated strikers as if they were laid off employees. However, under *Laidlaw* unreinstated strikers remain employees on a preferential hiring list and do not lose accumulated seniority. As noted earlier, the fact that Respondent had no anti-union motive for its action does not privilege this interference with employee rights to organize and to strike.

Respondent argues that the Union agreed to its bidding procedure. However, the Union and

Respondent never reached either a strike settlement or collective-bargaining agreement. The Union may have agreed to a collective-bargaining agreement containing a bidding procedure. However, it did so in contemplation of receiving the benefits of the agreement, including recognition. The Union was decertified prior to receiving any of the benefits of the contract. Moreover, the agreement Respondent contends the Union agreed to does not resolve the issue in Respondent's favor. The agreement does not mention unreinstated strikers and there is no evidence that the Union agreed that unreinstated strikers were not current employees for purposes of bidding.[5] After a prior strike, a

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[5] Glen Shuck and Dan Hunker, the president of the production and maintenance, and clerical and laboratory units, respectively, both credibly testified that they did not know of a bidding procedure until "late March or

strike settlement agreement the Union agreed to permitted Respondent to delay recalling certain strikers in certain positions in order to facilitate start-up after the strike. That situation has no bearing on the instant case. In this case no strike settlement agreement was reached and the Union did not waive any of the *Laidlaw* reinstatement rights of the employees.

B. The Clerical Unit

Jack Longbine, Respondent's employee relations manager, testified that the principal change in the clerical area was the introduction of an increased reliance upon computers. Additionally, job content was different after the strike as Respondent attempted to combine job functions and become more efficient. Longbine testified that both

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early April of 1985." This was some 9 or 10 months after Respondent alleges the Union agreed to the bidding procedure.

the shipping clerk and payroll clerk jobs were busier after the strike. The testimony of General Counsel's and the Union's witnesses does not dispute this testimony. Glen I. Markle, Jr. has not worked for Respondent since the strike. Markle testified that certain of the unreinstated strikers had the necessary skills to perform the clerical jobs. Markle did not deny Longbine's testimony that the jobs are changed to the extent that computers are more heavily relied on and that the workload is increased. Witnesses now working in the clerical unit confirmed the reliance on computers and an increased volume of work.

Notwithstanding the increased use of computers and increased workload, I find no legitimate or substantial business reasons for limiting the bidding of job vacancies in the clerical unit to employees on the payroll and then filling the jobs with unreinstated

strikers only after the strike replacements and nonstrikers had failed to bid on the jobs. During the period of September 10, 1984 through December 1985, Respondent admittedly had vacancies in clerical unit positions and bid these jobs. The unreinstated strikers were not given an opportunity to bid. Thereafter, when no employee bid on the job, an unreinstated striker was chosen and recalled for the position. The strikers were not recalled on the basis of seniority (as required under the prior collective-bargaining agreement) but rather on Respondent's view of the best qualified person for the job. No reason was given why Respondent could not have opened the bidding to the unreinstated strikers for each of these positions. It was clear that a position was vacant and that Respondent was adding to its work force. Respondent cannot argue that none of the unreinstated strikers

could perform the job because it, in fact, chose an unreinstated striker to fill each position. However, only after nonstrikers and strike replacements had passed on the bid opportunity did Respondent permit the strikers to bid on the jobs. The result of each such action was to clearly indicate that nonstrikers and strike replacements had superseniority as opposed to unreinstated strikers and that unreinstated strikers would obtain only the least desirable positions.

Nothing in this decision should be construed as dictating which employee Respondent had to choose to fill a bid position. I am simply finding that Respondent was obligated, when adding to its work force, to allow unreinstated strikers to bid on the jobs. Respondent could still fill the job with the most qualified person, whether striker or not, and, whether reinstated or not.

Respondent argues that the most senior unreinstated striker was not qualified to perform the job. Assuming arguendo the truth of this assertion, Respondent was not obligated to choose the most senior unreinstated striker,[6] Respondent was simply required to permit the strikers to bid. Thereafter, Respondent could lawfully review the bids and select the most qualified person to fill the job. Under the law, Respondent should consider an employee's bid in a nondiscriminatory manner. In my view the Act is violated when an employer fails to permit an otherwise eligible employee to bid for a vacancy[7] because of his status as an

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[6] See pages 5-9 of my original decision.

[7] As stated earlier, I find that a vacancy for *Laidlaw* purposes is not created when Respondent is not increasing its work force.

unreinstated striker. The separate question of job qualification or job availability is relevant only with respect to the question of backpay and reinstatement. Thus, the final determination of job availability and possible backpay liability will be properly left to compliance. See *Apex Ventilating Co.*, 186 NLRB 534, fn. 1 (1970); *Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977); *Madison South Convalescent Center*, 260 NLRB 816 (1982).

C. The Production and Maintenance Unit

Following the strike, Respondent, suffering business losses, attempted to reduce its work force. Respondent greatly increased the productivity of its operations. Respondent installed new equipment and instituted new processes. The result was that Respondent increased production from 180 tons per year per employee in 1983 to 350 tons per year per employee in 1986. Further, Respondent has made

changes in the type of product it produces. Prior to the 1983 strike, 80 percent of Respondent's steel was "vanilla grades," i.e., an ordinary product. At the time of the hearing, 80 percent of Respondent's steel was "exotic critical grades," a specialty product.

Longbine testified that the plant service person job never existed pre-strike. It combined parts of several jobs that existed prior to the strike. However, Harold E. Adams, an employee of 31 years, testified that the job was the same before and after the strike. Adams had more knowledge of production and I credit his testimony over that of Longbine. Moreover, Longbine seemed more intent on arguing Respondent's position than in relating facts.

Longbine further testified that the Mill Relief job changed since the strike. Respondent created two separate jobs, Mill

Relief 1 and Mill Relief 2. One such job was quite similar to what existed prior to the strike, the other relieved the "furnace end." Harold Adams, Jack Gibson, Gerald Andreas and Phillip Bell, all testified that these positions were substantially the same before and after the strike. Adams, Gibson, Andreas and Bell are credited. It is not found that these jobs did not change but rather that the process of change was gradual and ongoing. For example, Michael D. Morris, plant superintendent, admitted that there were changes in the mill, both before the strike and during the strike. According to Morris, "You won't find a manufacturing or a production system that is constant and stable.... You're continually changing, modifying, upgrading and improving on."

Longbine further testified that the loader job in the shipping department has been more

complex since the strike and that there is more paperwork and more quality assurance requirements. Adams testified that the job was substantially the same before and after the strike. While Longbine is correct that the job now has more responsibilities, his testimony is not credited to the extent he implies that a person who performed the job prior to the strike could not, automatically, perform the job after the strike.

Robert J. Sikora, vice-president of manufacturing, testified that Respondent changed its production line and its production process. In 1985, Respondent instituted a Statistical Process Control (SPC) program. The purpose of the SPC is to ensure that "every operator controls the quality that gets through his work station, so at the end, we have a quality product instead of trying to inspect quality into the product." Respondent puts its

employees through a training program to learn the principles of the SPC. Sikora further testified that in April 1985 Respondent instituted an "ultra-high-powered efficiency furnace." According to Skiora, the process utilized on this furnace is "completely different" from any used prior to the strike. Sikora also testified that new processes were used in Respondent's Melt Shop. In its yard, Respondent went to an entirely new high-pressured descale system. Respondent also changed its standards as to the heating of the different kinds of steel. Further, Respondent has modified its rolling process in its Mill Complex.

Sikora further testified to changes in other processes. Respondent changed from a "dunk tank" to a new high-pressured descale system and installed a new metallurgical standard practice. In its Mill Complex, Respondent

modified procedures and its inspection processes.

While I credit Sikora's testimony, I do not find that it establishes that the skills required in the production and maintenance process did not remain the same or that somehow the unreinstated strikers could not learn the new processes. Sikora testified that Respondent has trained its employees to maximize flexibility and to reduce manning requirements. However, contrary to assertions by counsel, his testimony does not establish that an experienced worker on the *Laidlaw* list could not perform work in the plant. When a vacancy occurs, and Respondent is adding to its work force, Respondent could permit unreinstated strikers to bid on the job and still choose the most qualified person for the bid job. During the relevant time period, Respondent filled the jobs with employees on

the payroll and then recalled unreinstated strikers to the lowest jobs. However, nothing in Sikora's testimony establishes that Respondent would be harmed by permitting the unreinstated strikers (many of whom have many years of experience) to bid on the jobs.

Joe Corvin, Melt Shop general foreman, testified "there really isn't anything in the Melt Shop that is the same. We've added a different piece of equipment to just about every job." Corvin estimated that even if a person had been a Third Helper pre-strike, it would require about 3 months' training for that individual to be able to do the job post-strike. Corvin testified that the job of Refractory Man and Casting Operator have changed since the strike. Corvin was contradicted by Adams and Dennis Prather who testified that these jobs were substantially the same both before and after the strike.

While no doubt these jobs have changed since the strike, Corvin was apparently talking about the changes in equipment and processes rather than the skill and experience necessary to perform the job. Again, I find Corvin's testimony insufficient to establish that the unreinstated strikers were unable to perform these jobs. The jobs were more demanding after the strike but that does not establish that the strikers were unable to perform the jobs post-strike. More important, lawful posting of these jobs still would have permitted Respondent to choose the most qualified person for the job. Respondent could not disqualify unreinstated strikers simply because they were outside the plant.

Michael D. Morris, plant mill superintendent, testified that the mill has had equipment changes and is running completely different products with different standards. According

to Morris many of the jobs in the mill now require more accuracy. However, Morris conceded that the employees' experience at Respondent's old facility helped them learn the operation at Respondent's new facility. Morris conceded that there was a continuing upgrading process. Again while I find that Morris' testimony establishes that Respondent's current operation places greater demands on the employees, it does not establish that the unreinstated strikers were no longer qualified to perform the new jobs or to operate the new equipment. There is no reason to believe that the strikers could not cope with the greater demands of the changed operation as the non-strikers and replacements did.

D. Conclusions

This case exemplifies the posturing that takes place in Board Proceedings. In the representation proceedings, the Union claimed

that it had an agreed-upon contract with Respondent. On the other hand, Respondent claimed that it did not know what the Union had agreed to and that no contract had been formed. In the instant case, Respondent claimed the Union had agreed to a contract including a provision which permitted a bidding practice found unlawful herein. The Union turned around and argued that no contract had been formed.

Similarly, Respondent's witnesses exaggerated the changes in job functions which have resulted from Respondent's updating of its equipment and processes. On the other hand, the Union's witnesses attempted to minimize the changes and claimed that the jobs were substantially unchanged after the strike. The truth lies somewhere in-between. The jobs have changed but the changes in job content and volume of work have not minimized the skill and experience of the unreinstated strikers.

Respondent has not established that none of the unreinstated strikers are qualified to perform the jobs and operate the equipment. The burden of proof, that the failure to allow unreinstated strikers to bid on job vacancies was justified by legitimate and substantial business reasons, lies with Respondent. *Laidlaw, supra*; *Fleetwood Trailer, supra.* I find that Respondent has not met that burden.

Its posturing aside, the real reason that Respondent failed to include unreinstated strikers in its bidding procedure was that "it's the practice that [Respondent] followed in the past, and it's also practiced in the industry." Respondent simply failed to recognize that by law unreinstated strikers remain employees on a preferential hiring list.[8]

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[8] The unreinstated strikers are entitled to full reinstatement upon the departure of replacements unless they have acquired other employment or the Employer

Although not intending any violation of law, Respondent mistakenly treated the strikers as inferior to nonstrikers and replacements as if the strikers were less senior employees on layoff. The changes in Respondent's equipment and processes do not amount to justification for such conduct.

After due consideration of the remand and the briefs submitted after the remand, I adhere to my original conclusion that Respondent violated the *Laidlaw* rights of unreinstated striker when adding to its work force it first posted vacant jobs for nonstrikers and permanent replacements and denied qualified unreinstated strikers the opportunity to bid on these jobs. The nonstrikers and permanent replacements were given superseniority and the unreinstated

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can show business justification. *Laidlaw, supra*, 171 NLRB at 1370.

strikers were left with the residual after the bidding procedure had run its course. *MCC Pacific Valves*, 244 NLRB 931, 934 (1979); *Randall, Burkhart/Randall, Division of Textron, Inc.*, 257 NLRB 1 (1981), enfd. 687 F.2d 1240 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983). See also *Overhead Door Corporation*, 261 NLRB 657, 664-665 (1982). Accordingly, I reaffirm the following conclusions of law and recommended order.

Conclusions of Law

1. Gilmore Steel Corporation d/b/a Oregon Steel Mills, Inc. is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO and its Locals 3010 and 6380 are labor organizations within the meaning of Section 2(5) of the Act.

3. By failing and refusing to offer unreinstated strikers the opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on such jobs, Respondent violated Section 8(a)(3) and (1) of the Act.

4. Respondent has failed to establish that its conduct described in Conclusions of Law 3 above was justified by legitimate and substantial business reasons.

5. Respondent has not, except as specifically found above, violated the Act as alleged in the complaint and bill of particulars.

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent shall be ordered to offer reinstatement to the strikers who, at the compliance stage of this proceeding, are discovered to have been denied an opportunity to bid upon job vacancies[9] and make whole all such strikers for any loss of pay they may have suffered by reason of Respondent's discrimination against them, such payment to be made in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987). See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I

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[9] See e.g., *Randall, Burkhart/Randall, supra*, 257 NLRB 1.

hereby issue the following recommended.[10]

ORDER

The Respondent, Gilmore Steel Corporation d/b/a Oregon Steel Mills, Inc., Portland, Oregon, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Refusing to offer to qualified unreinstated strikers the opportunity to bid on job vacancies until after nonstrikers and strike replacements have failed to bid on such jobs.

b. In any like or related manner

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[10] All outstanding motions inconsistent with this recommended Order hereby are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

a. Offer reinstatement and backpay to any strikers who, at the compliance stage of this proceeding, are discovered to have been denied an opportunity to bid upon job vacancies, in the manner set forth in the section of this Decisin [sic] entitled "The Remedy."

b. To the extent it has not already done so, pay the striking employees, pursuant to the settlement agreement in these cases, vacation pay at the wage determined by their last pay quarter.

c. Post at its plant in Portland, Oregon, copies of the attached notice marked

"Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

d. Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order what steps Respondent has

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[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

taken to comply herewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized agents, may obtain discovery from Respondent, its officers, agents, successors or assigns, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order, as enforced by the Court.[12]

IT IS FURTHER ORDERED that the consolidated complaint and bill of particulars be dismissed insofar as they allege violations of the Act not specifically found herein.

Dated: July 22, 1987.

JAY R. POLLACK
Administrative Law Judge

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[12] See *Hilton Inn North*, 279 NLRB No. 9, Slip op. p. 2, n. 3 (1986).

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to offer to qualified unreinstated strikers the opportunity to bid on

job vacancies in preference to nonstrikers and strike replacements on the payroll.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them under the National Labor Relations Act as set forth above.

WE WILL offer reinstatement and backpay, with interest, to any strikers who were unlawfully denied an opportunity to bid upon job vacancies because we preferred nonstrikers and strike replacements then on the payroll.

GILMORE STEEL CORPORATION
d/b/a OREGON STEEL MILLS, INC.
(Employer)

Dated _____ By _____
(Representative)
(Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 Second Avenue, Room 2948, Seattle, WA 98174; telephone: (206) 442-7472.

APPENDIX F
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILMORE STEEL CORPORATION d/b/a Oregon Steel Mills, Inc., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 88-7488 NLRB Nos. 36-CA-4837 36-CA-4938 36-CA-4841 36-CA-4893, etc. et al. ORDER
UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD Respondent.	)	No. 88-7504 NLRB Nos. 36-CA-4837 36-CA-4938 36-CA-4841 36-CA-4893, etc. et al.
NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. GILMORE STEEL CORPORATION, d/b/a Oregon Steel Mills, Inc., Respondent.	)	No. 88-7543 NLRB Nos. 36-CA-4837 36-CA-4938

Before: PREGERSON, TROTT and RYMER, Circuit Judges

The petition for rehearing is denied.

(2)

No. 89-1461

Supreme Court, U.S.
FILED
MAY 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

GILMORE STEEL CORPORATION, d/b/a
OREGON STEEL MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by failing to offer unreinstated strikers an opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on them.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1461

GILMORE STEEL CORPORATION, d/b/a
OREGON STEEL MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) unreported. The decision and order of the Board (Pet. App. 4a-15a), including the decision (Pet. App. 16a-65a) and supplemental decision (Pet. App. 80a-111a) of the administrative law judge (ALJ), are reported at 291 N.L.R.B. No. 27. The Board's order remanding the proceeding to the ALJ (Pet. App. 72a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1989. A petition for rehearing was

denied on December 14, 1989. Pet. App. 118a-119a. The petition for a writ of certiorari was filed on March 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a steel mill in Portland, Oregon, where it employs between 500 and 600 employees. For many years, petitioner's employees were represented in two separate bargaining units by local unions of the United Steelworkers of America, AFL-CIO (the Union). The last collective bargaining agreement for both units expired on September 1, 1983, and both units then went on strike. Petitioner continued to operate, using non-strikers, permanent replacements, and, in the clerical unit, a few temporary employees. Pet. App. 25a-26a.

On June 26, 1984, the Union, on behalf of the striking employees in both units, made an unconditional offer to return to work. By that time, all of the strikers had been permanently replaced, and they were placed on a preferential recall or "*Laidlaw*" list.[1] No agreement was reached on the terms of a new contract, and in January 1985 the Union was decertified as the representative of the employees in both units. Pet. App. 26a-27a.

After the strikers offered to return to work, petitioner filled vacant jobs by posting vacancy notices within the plant so that employees on the payroll could bid on openings. Unreinstated strikers were not permitted to participate in the bidding, but were notified of vacancies only when an opening was not bid on by an employee already on the payroll, or when

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[1] See *The Laidlaw Corporation*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

petitioner wished to fill the vacated position of a working employee who had successfully bid for a more desirable job. Pet. App. 27a-28a, 53a-54a, 85a-86a. Prior to decertification of the Union, petitioner used seniority as a basis for selecting strikers to fill any vacancies available after completion of the bidding procedure; after decertification, petitioner recalled strikers based on a determination of merit or performance. *Id.* at 30a.

2. The Union and a number of individual employees filed unfair labor practice charges, alleging, inter alia, that petitioner unlawfully refused to allow unreinstated strikers to bid on all available vacancies and to reinstate them according to seniority. Pet. App. 21a-22a.

a. In his initial decision, Pet. App. 16a-71a, the ALJ held that petitioner had no obligation to recall the strikers according to seniority. *Id.* at 30a-42a. The ALJ also found that petitioner had lawfully excluded unreinstated strikers from bidding on a job when that job was filled by a working employee and no vacancy was created by the transfer of the successful bidder, resulting in a net decrease in the work force. The ALJ noted that "[f]ollowing the strike, [petitioner], suffering business losses, attempted to reduce the size of its work force. When job vacancies arose, [petitioner] attempted to fill these positions from within the plant without recalling strikers, thereby decreasing its total work force." *Id.* at 27a. The ALJ concluded that with respect to those jobs, petitioner's "conduct [was] justified by substantial business reasons." *Id.* at 55a. The ALJ explained, *ibid.*:

> In the business down turn, [petitioner] was increasing its productivity and decreasing its work

> force. It could, therefore, nondiscriminatorily transfer employees without recalling unreinstated strikers. To hold otherwise would require [petitioner] to create vacancies for the unreinstated strikers and then lay off nonstrikers and replacements as a result of such transfers. *Laidlaw* does not create such rights for unreinstated strikers and should not be used to force [petitioner] to utilize such poor business measures.

The ALJ concluded, however, that petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by precluding unreinstated strikers from bidding for jobs that created an actual vacancy in the workforce. The ALJ pointed out that, if there was a vacancy in the workforce to be filled, "[w]hen employees were recalled from the *Laidlaw* list, it would be to jobs left vacant by either the transfer of employees on the payroll or the failure of employees to bid on jobs. The effect was that strikers were only recalled to less favorable jobs." Pet. App. 54a.

b. Finding that the ALJ had failed to consider relevant evidence or resolve credibility disputes concerning petitioner's alleged business justification for its bidding system, the Board remanded the case to the ALJ. Pet. App. 72a-79a. The Board noted that petitioner presented witnesses who testified that, because of the change in "equipment and job functions" after the strike, "unreinstated strikers were no longer qualified to perform the new jobs and operate the new equipment, and that its bidding procedure was essential to its survival." *Id.* at 75a. The General Counsel, on the other hand, presented witnesses who testified that the "skills needed in the production and maintenance process remained the same" and that the bid-

ding procedure was not supported by "considerations of efficiency." *Id.* at 76a.

c. On remand, the ALJ adhered to his initial decision. Pet. App. 107a. Citing *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967), and the Board's *Laidlaw* decision, the ALJ stated that "[t]he treatment of unreinstated strikers as inferior or subservient to other employees in this case is inherently destructive of the employees' right to strike and constitutes an unfair labor practice notwithstanding the absence of animus or bad faith *unless* the Employer sustains his burden of proof that the conduct was justified by legitimate and substantial business reasons." Pet. App. 87a-88a.

The ALJ found that there was "no testimony" supporting petitioner's contention that the "bidding procedure was essential to its survival." Pet. App. 88a. He rejected petitioner's claim that its conduct was justified by its own past practice and the practice in the industry of filling vacancies from the existing work force. The problem with that reasoning, the ALJ explained, was that, under *Laidlaw* and its progeny, the unreinstated strikers were part of petitioner's existing work force, while its bid procedures resulted in treating them as if they were laid off employees. *Id.* at 89a.[2]

The ALJ found that petitioner had not established, as to any of the posted jobs, that the post-strike changes petitioner had made in its product and method of operation had materially changed the jobs

[2] The ALJ noted that petitioner had never before been "faced with the situation of having unreinstated strikers awaiting recall pursuant to their *Laidlaw* rights." Pet. App. 56a.

or impaired the strikers' qualifications to perform them. Pet. App. 93a-104a. Concerning the clerical unit, the ALJ acknowledged that there was an increased dependence on computers, but he pointed out that petitioner "cannot argue that none of the unreinstated strikers could perform the job because it, in fact, chose an unreinstated striker to fill each position" after nonstrikers and strike replacements had passed up the bid opportunity. *Id.* at 93a-94a.

Concerning the production and maintenance unit, the ALJ concluded that, while petitioner had shown that its current operation placed greater demands on employees, that showing did not "establish that the unreinstated strikers were no longer qualified to perform the new jobs or to operate the new equipment. There is no reason to believe that the strikers could not cope with the greater demands of the changed operation as the non-strikers and replacements did." Pet. App. 104a.[3]

The ALJ emphasized that petitioner was entitled to fill vacant jobs "with the most qualified person, whether striker or not, and, whether reinstated or not." Pet. App. 94a, 101a-102a. Petitioner "was simply required to permit the strikers to bid * * * [and] could lawfully review the bids and select the most qualified person to fill the job." *Id.* at 95a, 103a. What petitioner could not do was refuse "to permit an

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[3] The ALJ credited the testimony of long-term employees that certain jobs remained the same after the strike. Pet. App. 97a-98a. He also found that production changes were part of an on-going process that antedated the strike, *id.* at 98a, and that, while petitioner established that there were changes in the production process, it did not establish "that the skills required * * * did not remain the same or that somehow the unreinstated strikers could not learn the new process." *Id.* at 101a.

otherwise eligible employee to bid for a vacancy because of his status as an unreinstated striker." *Id.* at 95a-96a, 103a (footnote omitted).

d. The Board upheld the ALJ's decision. Pet. App. 4a-15a. Nonetheless, it modified the ALJ's recommended order to require reinstatement and backpay only to those strikers found in compliance proceedings to have been denied reinstatement as a consequence of petitioner's failure to offer them an opportunity to bid on job vacancies. Pet. App. 7a, 10a; compare *id.* at 112a.

3. The court of appeals concluded that substantial record evidence supported the Board's findings and that it had correctly applied the law to the facts. The court enforced the Board's order in an unpublished memorandum order. Pet. App. 1a-3a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. "[T]he status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment.'" *Fleetwood Trailer*, 389 U.S. at 381 (quoting 29 U.S.C. 152(3)). Upon an unconditional offer by striking employees to return to work, an employer is obligated to accord preferential status to strikers who have been permanently replaced and to offer to reinstate them to their former, or substantially equivalent, positions when such positions become available. *Fleetwood Trailer*, 389 U.S. at 381; *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 103 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer commits an unfair labor prac-

tice if it refuses to reinstate strikers to their former, or substantially equivalent, positions without prejudice to their seniority or other employment rights, unless it "can show that [its] action was due to 'legitimate and substantial business justifications.'" *Fleetwood Trailer*, 389 U.S. at 378 (quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)).

At the same time, refusing to displace permanent replacements to provide jobs for unreinstated strikers is a "legitimate and substantial business justification[]." *Fleetwood Trailers*, 389 U.S. at 379; *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). As the Court reiterated in *Trans World Airlines, Inc.* v. *Independent Flight Attendants (TWA* v. *IFFA)*, 109 S. Ct. 1225, 1232 (1989), unreinstated strikers may not be discriminated against in the filling of available positions, but "[t]he positions occupied by newly hired replacements, employees who refused to strike, and employees who abandoned the strike, are simply not 'available positions' to be filled."

Relying on *TWA* v. *IFFA*, petitioner contends that it was entitled to restrict its bidding procedure to "currently working employees." Pet. 15-18. That contention lacks merit. *TWA* v. *IFFA* held that, at the end of an economic strike, an employer is not required to displace junior nonstrikers and early returning strikers in order to create vacancies for more senior full term strikers. 109 S. Ct. at 1230. Here, too, the Board held that petitioner was not required to permit unreinstated strikers to bid for jobs where the result would be to displace a currently working employee. *TWA* v. *IFFA* did not hold that an employer may preclude an unreinstated striker from bidding on a vacant job for which he is qualified when

the filing of the vacancy involves no displacement of a current employee.

Petitioner contends that its bidding system is not "inherently destructive" of the right to strike because "[i]t applies uniformly across the board—to new hires, replacements and *reinstated Laidlaw* people alike" and "does not create any obstacle to the future exercise of employee rights." Pet. 19-20 (emphasis added). But petitioner's system does discriminate against *unreinstated* strikers. As the ALJ found, petitioner's system excludes unreinstated strikers from consideration from all available positions until after working employees have had a chance to bid on them—an exclusion that, in effect, gives the working employees super-seniority over the unreinstated strikers. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).[4]

The Board, upheld by the courts of appeals, has consistently held that preferences for existing employees over unreinstated strikers in filling post-strike vacancies is inherently destructive of employees' right to strike. See, *e.g.*, *Arlington Hotel* v. *NLRB*, 785 F.2d 249 (8th Cir.), cert. denied, 479 U.S. 914 (1986) (employer unlawfully refused to consider strikers for positions for which they were qualified and which employer filled by transferring striker replacements and hiring new employees); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d

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[4] Petitioner errs in relying, Pet. 17, on the Court's statement in *TWA* v. *IFFA*, 109 S. Ct. at 1232, disapproving the expansion of *Erie Resistor* to the circumstances of that case. The Court's statement in *TWA* v. *IFFA* related to jobs that had been filled by permanent replacements and early returning strikers during a strike, not to the lawfulness of precluding unreinstated strikers from bidding on positions that became vacant after the strike.

1240, 1243-1247 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983) (unlawful to grant active employees preference over strikers in selection for openings in "special rated" jobs); *Wisconsin Packing Co.*, 231 N.L.R.B. 546, 549 (1977) (unlawful to give preference in job vacancies to currently active or laid-off employees over unreinstated strikers); *MCC Pacific Valves*, 244 N.L.R.B. 931 (1979), enforced in part, denied in part, and remanded mem., 665 F.2d 1053 (9th Cir. 1981) (same).[5] Petitioner's essential error is its assumption that it is permitted to treat unreinstated strikers as if they had no entitlement to reinstatement when jobs become available. As *Fleetwood* makes clear, "[i]f and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." 389 U.S. at 381.

2. Petitioner further contends that the Board improperly required it to prove a legitimate and substantial business justification for its conduct. Pet. 25-27. Petitioner asserts that under *Great Dane Trailers*, it need only "come forward with evidence" of such justification, and that *Great Dane* "does not say 'prove', either in the abstract or to the satisfaction of the Board." Pet. 27. But *Great Dane* does say, expressly, that, once it has been shown that an employer has "engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." 388 U.S. at 34. And *Fleetwood Trailer* made

[5] The court of appeals cases cited by petitioner, Pet. 18-19, do not involve the reinstatement of strikers, and they do not suggest that a refusal to consider unreinstated strikers for vacant positions would be lawful.

plain that "[t]he right [of a striker to reinstatement to an available position] can be defeated only if the employer can show 'legitimate and substantial business justifications'." 389 U.S. at 381 (quoting *Great Dane*, 388 U.S. at 34).[6]

3. Finally, petitioner contends that it proved a legitimate and substantial business justification on the basis of its need "to operate efficiently and with continuity." Pet. 29. That argument merely quarrels with the Board's finding, upheld by the court of appeals, that petitioner's refusal even to *consider* unreinstated strikers for available positions was not justified by business considerations. That fact-bound contention raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as shown above, the ALJ amply supported his finding that petitioner did not have a substantial business justification.

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[6] As the Eighth Circuit explained in *Randall*, 687 F.2d at 1245:

> The [Supreme] Court [in *Great Dane*] set up the following balancing test: if it can be shown that the employer's conduct adversely affected employee rights, the burden shifts to the employer to prove a legitimate and substantial business justification. If the harm to employee rights is slight, and the employer shows business justification, the burden then shifts back to the charging party to show discriminatory motivation. However, no proof of anti-union motivation is required if the harm to employee rights is relatively great or if the employer fails to show business justification.

Accordingly, while the Board properly found that petitioner's conduct was "inherently destructive," even a finding of a lesser impact on employee rights would have imposed on petitioner a burden of justifying use of its bidding system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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